U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 23 February 2006

CASE NO.: 2005-LHC-1363

OWCP NO.: 07-170719

IN THE MATTER OF

NATHAN A. BOUTTE,
Claimant

v.

TUBULAR TECHNOLOGY, INC.,
Employer

and

THE GRAY INSURANCE COMPANY,
Carrier

APPEARANCES:

Michael J. Samanie, Esq.,
Stephen S. Stipelcovich, Esq.,
On behalf of Claimant

John H. Hughes, Esq.,
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., brought by Nathan A.

Boutte (Claimant) against Tubular Technology, Inc., (Employer) and the Gray Insurance Company (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on October 21, 2005 in Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant and his wife, Mary Boutte, testified live, and introduced 15 exhibits of which CX 1-12, 13 (a) (b) and (d), 14, and 15 were admitted, including medical records and depositions from Drs. John E. Cobb, Don Langford, J.A. Mata, Daniel L. Hodges; medical records from Dauterive Hospital, Lafayette Surgical Specialty Hospital, and St. Martinville Clinic; various demand letters to Employer; Claimant's personnel record; letter to Dr. Poche from Elton Broussard. Employer called one live witness (Jody A. Arceneaux), and introduced 10 exhibits DOL forms 207 and 208, a lost fund payment sheet; correspondence from Claimant's attorney to Elton Broussard; payroll documentation of payments to Claimant; depositions of Drs. Gregory Bernard, Thomas Montgomery, and Gregory Gidman; correspondence from Jody Broussard to Claimant.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. On February 29, 2004, Claimant was injured while working in the course and scope of his employment with Employer.

2. Employer was advised of the injury on March 1, 2000.

3. Employer filed a notice of controversion on June 3, 2004.

4. An informal conference was held on August 10, 2004.

5. Claimant's average weekly wage at the time of injury was $827.28.

6. Employer paid Claimant his normal wages in lieu of compensation from February 29, 2004 through June 4, 2004 in the amount of $10, 268.97 and temporary total disability benefits from July 14, 2004 through March 30, 2005.

7. When Claimant reached MMI Employer commenced payment of permanent partial disability benefits based upon a 20 % scheduled injury to Claimant's left lower extremity.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Nature and Extent of Injury: Whether Claimant is entitled to total and temporary disability benefits from February 29, 2004 to present and continuing.

2. Medical Benefits: Whether Employer should pay for Claimant to undergo back surgery as recommended by Dr. Cobb pursuant to Section 7 of the Act.

3. Attorney's fees and interest.

III. STATEMENT OF THE CASE

A. Claimant and Mary A. Boutte's Testimony

Claimant is a 46 year old male born on August 9, 1959 with an 8th grade education. Claimant's past work consisted of animal care at a research lab, craw-fishing, airboat and cable boat pilot, cane farming, alligator hunting, machinery operation, and offshore pipe testing. (Tr. 20-24, 29, 30). [1] In September, 2003,

Employer hired Claimant to work on rigs testing pipe. (Tr. 32, 33).[2] On February 29, 2004, Claimant went to Cameron, Louisiana where he boarded a boat and proceeded to go off shore. The job was cancelled because of weather and Claimant returned to the dock. As Claimant was proceeding to jump from one boat to another his left leg caught the bottom of a cabin deck, twisted, and injured his back. (Tr. 34, 35). Claimant felt an immediate pain in his lower back radiating into buttocks. The accident happened at 6:30 p.m. (Tr. 36-38).

On March 1, 2004 Claimant went to his family physician, Dr. J.A. Mata complaining of low back and right leg pain. Dr. Mata examined Claimant, took x-rays, prescribed medication, and told him to stay off work for the rest of the week. Following the examination Claimant reported the accident to Employer who in turn sent him to Dr. Don Langford who examined him and recommended an MRI. Following that examination Employer sent Claimant to Dr. Gregory Gidman for further evaluation. (Tr. 39-42). After that evaluation, Claimant returned to Dr. Mata who sent him to physical therapy. Therapy was only partially successful in relieving right leg pain so Dr. Mata referred Claimant to orthopedist, Dr. John E. Cobb. (Tr. 43, 44).

On April 14, 2004, Claimant saw Dr. Cobb who has continued to treat him. Dr. Cobb administered a nerve block which relieved the pain for only a few days and eventually recommended surgery which Claimant agreed to undergo because of an inability to do anything. Employer refused to authorize the surgery after which Dr. Cobb referred Claimant to Dr. Daniel Hodges for pain management. (Tr. 45, 46). In turn, Dr. Hodges has prescribed various medications for pain and sleep including Lortab, Amitriptyline, and Xanax which in turn have caused drowsiness. Claimant has also been evaluated for short periods of time by Drs. Gregory Bernard and Thomas Montgomery on referrals from a boat company Claimant is suing and DOL. (Tr. 47-49).

Claimant testified that Dr. Montgomery told him that if Dr. Cobb recommended surgery he would agree. Claimant cannot stand or walk for long periods due to severe back and left leg pain. Claimant estimated he could stand for 10 minute, was unable to sweep or do yard work, and had to spend most of the day in a recliner watching TV. (Tr. 52). Claimant attempted to return to light duty for two weeks but was unable to continue due to pain. (Tr. 54-56, 71-75).

[2] Claimant's personnel file shows August 13, 2003 as the date of hire with termination on June 10, 2004. (CX-14, p. 1).

Claimant's wife, Mary A. Boutte, testified that Claimant loved his work with Employer, but after the accident has been in constant pain and unable to do much of anything including outdoor activities such as hunting and fishing. (Tr. 85). Claimant has been unable to sleep much and had always been a good provider prior to his injury. Now he is willing to do whatever it takes to return him to normal. (Tr. 86).

B. Testimony of Jody Allen Arceneaux

Mr Arceneaux, a comptroller for Employer responsible for overseeing accounting, finance, insurance, and human relations, testified that following Claimant's accident he was put on light duty, but left that job after which Employer sent Claimant a letter dated May 25, 2004 again offering him light duty per Dr. Gidman's recommendation. (EX-9). Employer waited two to three weeks, received no reply and terminated Claimant. (Tr. 90-93). Employer has a policy of providing light duty to injured workers whereby they assign work according to doctor imposed restrictions. According to that policy, Claimant was given light work including truck driving and paid his regular wage. Mr Arceneaux testified that light duty was still available to Claimant. (Tr. 94, 95). Claimant was paid his regular wage in lieu of compensation from February 29, 2004 through June 3, 2004 and then temporary total disability benefits from July 15, 2004 through March 30, 2005.

C. Testimony and Medical Records of Drs. Mata, Cobb, and Hodges

Dr. Matta has been Claimant's family doctor since 1990. On March 2, 2004 Claimant saw Dr. Matta complaining of low back pain. Dr. Matta ordered x-rays which were normal and prescribed medication. On March 16, 2004, Dr. Matta saw Claimant, prescribed physical therapy 3 times a week (CX-10), and reviewed an MRI of March 10, 2004 (CX-8), which showed mild foraminal stenosis on the left at L5-S1 related to disc degeneration and foraminal disc protrusion. (CX-6, pp. 6, 10, 35 101, 106, 109). On March 29, 2004, Claimant saw Dr. Matta for a third time again complaining of back pain and requesting a referral to Dr. Cobb. (Id. at 9).

Dr. Matta, who is board certified in family practice, testified that he initially saw Claimant on June 14, 1990 for pain related to a previous back injury. Dr. Matta examined Claimant and changed his medication prescribing Pamelor and

Xanax. Thereafter, he saw Claimant in August, and October, 1990 for back and chest pain. Dr. Matta next saw Claimant on July 19, and September 12, 1994 for left arm, shoulder and neck pain related to a motor vehicle accident. Dr. Matta then saw Claimant in 1995 for gastroesophageal reflux, May, 1998, for a fish bone injury, September, 1998, to examine a bullet fragment in his right hip, December, 1998, for an upper respiratory infection; December, 1990, for removal of a tick, June, 2001, for a fungal infection, November, 2001, for a viral illness and then on March 2, and 29, 2004 for back pain related to the current injury. When Claimant failed to improve Dr. Matta suggested referral to a neurosurgeon, but Claimant requested orthopedist Dr.Cobb. (CX-7, pp. 32-36). On the March 29, 2004 exam, Dr. Matta found a positive left leg raising. Dr. Matta testified that regarding the issue of back surgery he assumed Dr. Cobb was competent to render that opinion. (Id. at 40).

Dr. Cobb saw Claimant initially on April 14, 2004. On exam, Claimant had a positive left straight raising with complaints of increased pain on prolonged standing or sitting. Dr. Cobb read Claimant's x-ray as showing a moderate degree of adaptive changes in the L5-S1 facet joints, degeneration at L5-S1 with foraminal narrowing on the left at L5-S and annulus bulging and bony hypertrophy. Dr. Cobb opined Claimant had post-traumatic lumbar pain syndrome with radiculitis on the left at the neuroforamen of L5-S1, superior facet impingement on the nerve at L5, recommended a nerve block at L4-5 and found Claimant unable to work. (CX-1, pp. 78-80). On a second visit of June 23, 2004, Claimant's condition was unchanged with Dr. Cobb recommending a laminectomy, and decompression of the L5-S1 area on he left and prescribing Neurontin. (Id. at 75). In a letter to Claimant's attorney dated September 9, 2004, Dr. Cobb explained the need for surgery stating Claimant had a post-laminectomy syndrome with radiculitis based on instability and with symptoms consistent with anterior column failure and axial instability. All of these findings were based on clinical findings and examination and rendered Claimant unable to work. (Id. at 72-74). Subsequently the procedure was clarified to include an anterior lumbar interbody fusion of L5-S1 with danek dowels, laminectomy, decompression, disc excision of L4-5 on the right and L5-S1 on the left, EBS and neuromuscular stimulator, to include pre-op fitting with lumbrosacral orthosis. (Id. at 38).

On October 26, 2004 Claimant underwent a lumbar CT scan and myelogram which showed multiple levels of abnormalities sat L3-4, L4-5, and L5-S1 with disc bulging and foraminal narrowing at L5-S1. (Id. at 34-37). On subsequent visits in 2004, and 2005, Claimant's condition remained unchanged with Claimant unable to work despite use of epidurals and medication. (Id. at 1, 2).

Dr. Cobb testified that Claimant's laboratory findings, MRI, myelogram and CT objectively supported the need for surgery with a weak positive straight leg raising showing a compressed nerve due to stenosis. (CX-2, p. 16, 17). Claimant's pain on the left side is due to instability of the anterior column caused by trauma after having undergone a previous back surgery. (Id. at 19).[3] Dr. Cobb disagreed with Drs. Benard, Gidman, and Montgomery that surgery was not warranted because of the lack of neurological deficits since the presence of such surgery less likely to succeed. (Id. at 22). Dr. Cobb testified that his recommendation for surgery was based not only on clinical findings and Claimant's myelogram, but was in accord with guidelines of the North American Spine Society.

Claimant began seeing Dr. Hodges for pain management in April with a follow up visit on June 8, 2005. Reports from both visits show Claimant continued to complain of low back and leg pain aggravated by walking, bending, stooping, and standing with a level 7 to 8 out of 10 pain. Claimant also complained of left foot numbness, headaches and sleep deprivation. Dr. Hodges examined Claimant, found a restricted range of lumbar motion and positive left straight leg raising and opined Claimant had lumbosacral instability, recommended emergency testing and prescribed medication. (CX-11, pp 3-23). Claimant had follow up visits on June 23, July 11 August 4, 8, September 12, 2005, but with no appreciable claim. (Id. at 76, 78, 79, 85-89).

Dr. Hodges, who is board certified in physical medicine and rehabilitation, testified that he works closely with Dr. Cobb in providing rehabilitation and pain management services and that Dr. Cobb referred Claimant to him. Dr. Hodges testified that he first saw Claimant on April 25, 2005 during which he took a history, examined Claimant, found sciatic notch tenderness on the left, equivocally positive straight leg raising on the left with a slight decrease pin prick over the left lateral calf, which were consistent with L5-S1 radiculopathy on the left. Dr. Hodges recommended EMG studies and continued use of hydrocodone and use of Elavil and Amitripline. (CX-12, pp. 11, 12). Dr. Hodges considered Claimant's complaints to be genuine. Carrier denied authorization for EMG testing. (Id. at 14, 15). Dr. Hodges recommended Claimant stay off work. (Id. at 16). On subsequent visits, Claimant's condition remained unchanged with Dr. Hodges recommending surgery as the only option for pain relief. (Id. at 22).

[3] Claimant underwent a lumbar laminectomy in April, 1989. (CX-2, p. 66).

D. Testimony and Medical Records of Drs. Langford, Bernard, Gidman, and Montgomery

Dr. Langford, a specialist in surgery and occupational medicine, testified that on March 3, 2004, Claimant was seen by Dr. Verne Thibodeaux, a family practitioner, at Employer's request. (CX-4, pp. 1-13). Claimant described the boat accident of February 29, 2004, and subsequent back and leg pain. (Id. at 19). Dr. Thibodeaux examined Claimant and found tenderness of the right gluteal area, decreased strength of both lower extremities due to pain, decreased range of lumbar motion and opined Claimant had lumbar strain. (Id. at 22-24).

Dr. Bernard, an orthopedist, saw Claimant on December 30, 2004, and again on October 19, 2005, on behalf of another employer, Lady Marine and Iberia Crew Boat. (EX-6, pp. 6, 7). At the first session Claimant met with Dr. Bernard for about 20 to 30 minutes in which Dr. Bernard took Claimant's history and physical. (Id. at 9, 10). Dr. Bernard testified that his exam was essentially normal except for mild tenderness on the right side, and shaking with straight leg raising on the left. Dr. Bernard read the myelogram and CT as normal despite a radiologist reporting a nerve root problem at L4-5. (Id. at 16). Dr. Bernard found no evidence of radiculopathy and no need for surgery and diagnosed back strain. (Id. at 17). Dr. Bernard's findings and recommendations were similar on the second meeting of October 19, 2005. (EX-10).

On cross, Dr. Bernard admitted he had performed surgery on patients who did not have objective signs of neurological deficit but complained of severe pain. (EX-6, pp 19, 20). Dr. Bernard also admitted he would not consider Dr. Cobb's recommendation for surgery to be a breach of the standard of care. (Id. at 21). Dr. Cobb also admitted that about 30% of his income comes from performing examinations for defendants.

Dr. Gidman, an orthopedist who has not operated since 1994, saw Claimant on one occasion on May 17, 2004 on a referral from Carrier. Dr. Gidman took Claimant's history and listened to his complaints of lower back and left leg pain, which limited his ability to walk and drive. (EX-8, pp. 9, 10). On exam he had limited forward flexion, moderate limitation of leaning to the right, arching backwards or hyperextending. (Id. at 13, 14). Dr Gidman interpreted the x-rays and MRI as essentially normal. (Id. at 16, 17). Dr. Gidman recommended home therapy and resumption of work activities and stated he did not need surgery. (Id. at 19). On cross, Dr. Gidman admitted that about 98% of his work and income came from employers and that he may have recommended surgery based solely on

subjective complaints and that Dr. Cobb's recommendation for surgery does not breach any standard of care. (Id. at 23, 32, 33).

Dr. Montgomery, an orthopedist, evaluated Claimant on behalf of DOL on October 21, 2004, during which he took a history of the accident, listened to Claimant's complaints of sharp low back pain radiating down his left leg with numbness in the left calf area and some non persistent pain in the right leg. (EX-7 pp. 11, 12). Claimant stated that physical therapy helped with the leg but not back pain, that the injection by Dr. Cobb did not help and that he had difficulty sleeping with increased pain with prolonged standing. On exam, Claimant had mild tenderness in the lower back with positive straight-leg raising. Dr. Montgomery read the March 10, 2004 MRI as shown mild arthritic changes at L4-5 with mild impingement of he left nerve root which was confirmed on a subsequent myelogram and post-myelogram CT. Dr. Montgomery did not recommend surgery and felt Claimant could return to light/medium duty. (Id. at 13-18). On cross Dr. Montgomery admitted that: (1) surgery was an option if conservative measures failed; (2) the MRI showing mild compression could explain Claimant's symptoms; (3) he has recommended surgery on the basis of subjective symptoms alone; and (4) the surgery recommended by Dr. Cobb could alleviate the symptoms. (Id. at 20-23).

IV. DISCUSSION

A. Contention of the Parties

Most of Claimant's arguments centered around the need for back surgery, as recommended by Dr. Cobb. Presumably Claimant contends he is not at maximum medical improvement (MMI) and will not be until Dr. Cobb is authorized and performs the requested back surgery. Until that point Claimant is temporarily and totally disabled. Further, when an injured employees seeking benefits is confronted by competing but medically reasonable treatment options, it is for the employee and not the Employer or Administrative Law Judge to decide which option to follow citing *Amos v. Director, Office of Workers' Compensation Programs*, 153 F.3d 1051 (9th Cir. 1998).

Employer, on the other hand, argues that: (1) Claimant while unable to perform his past work can nonetheless perform a restricted range of light duty which was offered but rejected by Claimant; (2) Employer does not owe Claimant

any additional compensation since it offered Claimant suitable alternative employment of light duty at his former salary; (3) if additional compensation is due Claimant, Employer is entitled to a credit for wages paid Claimant in lieu of compensation and for past compensation; (4) back surgery is neither reasonable nor necessary according to orthopedists, Drs. Gidman, Bernard, and Montgomery, all of whom examined Claimant and reviewed his medical records; (5) Claimant is at MMI and is in need of no further medical treatment.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

Having reviewed Claimant's testimony and demeanor, I am convinced that he is a sincere and credible witness who has and is experiencing severe back and leg pain which precludes all employment. In reaching this opinion I note that none of the doctors who either treated or examined Claimant found him to exaggerate symptoms. Further, Claimant has a good work history and even attempted but was unsuccessful in doing light work for Employer following unsuccessful conservative treatment.

C. *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New*

Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co., v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv., v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP, v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540. 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

Job availability should incorporate the answer to two questions: (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in

attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

In this case as noted above, I find Claimant to be a credible witness regarding his symptoms and physical limitations which preclude all work. Claimant's primary treating physicians, Drs. Hodges and Cobb have moreover found Claimant unable to work. While Employer produced testimony from Dr. Gidman, Bernard, and Montgomery showing Claimant can work, I am persuaded that the better and more informed opinion comes from Drs. Cobbs and Hodges, who have treated Claimant on multiple occasions and are more familiar with his true limitations. Indeed Dr. Cobb appears to be more knowledgeable, and practiced in back surgeries than any of the examining physicians. Claimant is thus totally disabled and inasmuch, as he still needs surgery to improve his condition he is temporarily disabled as well.

D. Medical Benefits

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.,* 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-*

Walsh Stevedoring Co., 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

In this case Claimant has been confronted with two apparently valid medical alternatives one spinal fusion recommended by Dr. Cobb or continued conservative therapy recommended by other physicians. In such a case it is the patient in consultation with his own doctor, who has the right to chart his own destiny. *Amos,* 153 F.3d at 1054. Not only did Dr. Cobb and Dr.Hodges recommend surgery, the examining physicians have all recommended surgery in other cases based on subjective complaints. Dr. Gidman even recommended surgery if Claimant demonstrated a positive straight leg raising which he did. In accord with *Amos* I find that Claimant has a right to chose surgery for which Employer is obligated to pay.

D. Interest and Attorney Fees

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties

have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908 (b) of the Act from February 29, 2004 to present and continuing based on an average weekly wage of $827.28.

2. Employer shall be entitled to a credit for all compensation including wages paid in lieu of compensation due to the February 29, 2004 injury which it previously paid to Claimant.

3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act including back surgery as recommended by Dr. Cobb.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge